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In the Supreme Court of the United States

OCTOBER TERM, 1991

DAVID H. LUCAS, PETITIONER

v.

SOUTH CAROLINA COASTAL COUNCIL

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF SOUTH CAROLINA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF REVERSAL

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QUESTIONS PRESENTED

This case involves the application to petitioner's beachfront lots of South Carolina's 1988 Beachfront Management Act. When this case arose, that Act prohibited the building of any habitable structure seaward of a setback line established by the South Carolina Coastal Council. The questions presented are:

1. Whether petitioner has a ripe claim that application of the Beachfront Management Act resulted in a taking of his property, in light of 1990 amendments to the Act that provide for issuance of special permits to build structures seaward of the setback line in certain circumstances.

2. Whether application of the Act to petitioner's lots results in a taking of property for which payment of compensation is required by the Fifth Amendment.

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INTEREST OF THE UNITED STATES

This case involves a claim that application of building restrictions under South Carolina's 1988 Beachfront Management Act to particular beachfront lots resulted in a taking of property within the meaning of the Fifth Amendment. The 1988 Act was approved by the Secretary of Commerce, through the National Oceanographic and Atmospheric Administration, as consistent with the Coastal Zone Management Act of 1972 (CZMA), 16 U.S.C. 1451 *et seq.* 54 Fed. Reg. 7580 (1989). The CZMA establishes a national policy of protecting the resources of the Nation's coastal zone and encouraging States to adopt coastal management programs that, *inter alia*, seek to minimize the loss of life and property caused by improper

development in flood-prone, storm surge, and erosion-prone areas and destruction of natural protective features such as beaches and dunes. 16 U.S.C. 1452(2), 1456b(a)(2). In addition, the National Flood Insurance Act of 1968, 42 U.S.C. 4001 *et seq.*, administered by the Federal Emergency Management Agency, conditions availability of federal flood insurance in communities on adoption of adequate flood-plain and land-use measures that are consistent with federal standards to reduce future losses. See 42 U.S.C. 4002(b)(3), 4022; *Adolph* v. *FEMA*, 854 F.2d 732 (5th Cir. 1988). Federal agencies also engage in direct regulation that affects real property (see, *e.g.*, Clean Water Act, 33 U.S.C. 1344; *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126-127 (1985) (wetlands)) and personal property (*e.g.*, food, drugs, and pesticides). At the same time, the United States has an obligation to ensure that such programs are implemented in a manner that respects basic constitutional protections. See Exec. Order No. 12,630, 3 C.F.R. 555 (1989) (directing the Attorney General to assist federal agencies to minimize the extent to which their regulatory activities result in a taking of property rights).

STATEMENT

1. In December 1986, petitioner purchased two beachfront lots in the Wild Dunes development on the Isle of Palms in South Carolina. T.R. 27.[1] He intended to build a single-family residence on each lot, one for his family and the other for investment. A house had been constructed on the lot situated between petitioner's two lots in the early 1980s; there

[1] "T.R." refers to the Transcript of Record that was filed in the South Carolina Supreme Court.

were also houses on other nearby beachfront lots. Pet. App. 36.

At the time, activities along the South Carolina coast were regulated by the State's Coastal Zone Management Act of 1977, S.C. Code Ann. §§ 48-39-10 *et seq.* The 1977 Act established coastal "critical areas," which included the beaches and primary ocean-front sand dunes. § 48-39-10(H), (I) and (J). The Act directed the South Carolina Coastal Council to develop an erosion-control policy, § 48-39-120, and authorized the Council, under general standards, to issue permits for development within critical areas. § 48-39-130. The line delineating the "critical area" along the Isle of Palms was seaward of petitioner's lots. As a result, those lots were not subject to restrictions under the 1977 Act when petitioner purchased them in 1986. Pet. App. 33-34, 36.

2. South Carolina's regulatory regime changed significantly with the enactment of the Beachfront Management Act, which became effective on July 1, 1988. The 1988 Act increased protection for the beach/dune system by extending the "critical area" to the entire zone between the mean high-water mark and a setback line fixed by the Council "utiliz[ing] the best available scientific and historical data." S.C. Code Ann. § 48-39-280(A) (Supp. 1990); see also § 48-39-10(J)(4) (Supp. 1990). Under the statute, the Council first must establish a "baseline." In an erosion zone such as that in which petitioner's lots are located—*i.e.*, an inlet zone that has not been stabilized by jetties or other structures—the baseline must be at the most landward point of erosion during the past 40 years, unless available data "indicate that the shoreline is unlikely to return to its former position." § 48-39-280(A)(2) (Supp. 1990). The Council then must establish a setback line landward of the base-

line by a distance 40 times the annual erosion rate, but not less than 20 feet. § 48-39-280(B) (Supp. 1990). The 1988 Act prohibited construction of habitable structures seaward of the baseline (and reconstruction of any preexisting structures that may be damaged beyond repair by natural causes or fire). §§ 48-39-300, 48-39-290(B)(8) (1988 S.C. Acts 5144, 5140); J.A. 3. As relevant here, the baseline falls on the road landward of petitioner's lots. See DX 22 (J.A. 9 (Map)); T.R. 71.

3. After passage of the 1988 Act, petitioner filed this inverse condemnation action seeking compensation for an alleged taking that resulted from application of the new statute to his lots. Although petitioner did not apply for a permit from the Council (or the town) to construct a house on either lot (T.R. 39-40, 98), the parties stipulated that a permit would have been denied under the 1988 Act had one been sought. The Council nonetheless "reserve[d] as an argument concerning temporary damages that no permit has been applied for by [petitioner]." J.A. 3-4.

The trial court found that at the time of purchase, there were no restrictions imposed by the State, county, or town on use of the lots for single-family residences and that the 1988 Act prevented that use. Pet. App. 36. The court determined that the Act "deprive[d] Lucas of any reasonable economic use of the lots" and rendered them "valueless," and found a taking on that basis. *Id.* at 37, 38, 40. The court awarded petitioner $1,170,000 in compensation, representing the fair market value of the lots on the date the 1988 Act became effective. *Id.* at 40.

4. A sharply divided South Carolina Supreme Court reversed, holding that no taking resulted from the 1988 Act's effect on petitioner's lots. Pet. App. 1-32.

It observed that although regulatory-taking questions are often complex, the appeal here presented a "relatively straightforward issue": whether petitioner was correct in arguing that "if he is deprived of 'all economically viable use' of his property, he must be compensated for it even if the regulation depriving him of such is a use-restriction regulation enacted to prevent serious public harm." *Id.* at 2-3. The court took petitioner to have conceded the validity of the Legislature's findings and that the Act "is properly and validly designed to preserve the extremely valuable resource which is South Carolina's beaches." *Id.* at 4. As a result, it reasoned, petitioner also conceded that construction "contributes to the erosion and destruction of this public resource" and that "discouraging new construction in close proximity to the beach/dune area is necessary to prevent a great public harm." *Id.* at 8. The court also noted that petitioner did not "contend that the setback requirements affecting him are unreasonable or disproportionate to the goal of preventing the specified harms." *Id.* at 15.

Against this background, the court rejected petitioner's contention that he is entitled to compensation, "regardless of any other consideration." Pet. App. 9; see *id.* at 9-17. It stated that "a taking has not been found when the regulation exists to prevent serious public harm," *id.* at 10, and explained this result on " 'the simple theory that since no individual has a right to use his property so as to create a nuisance or otherwise harm others, the State has not "taken" anything when it asserts its power to enjoin the nuisance-like activity.' " *Ibid.* (quoting *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470, 491 n.20 (1987)). Here, the court concluded, petitioner's failure to attack the legislative findings "that

new construction would cause serious public harm * * * amounts to a concession that the *Mugler* 'nuisance-type exception' applies." Pet. App. 12 (referring to *Mugler* v. *Kansas*, 123 U.S. 623 (1887)).

The two dissenting Justices acknowledged the *Mugler* decision and agreed that it precluded the finding of a taking if the statute is necessary for the public's health, safety, and welfare, "regardless of the extent of loss suffered by the property owner." Pet. App. 20; see *id.* at 20-23. However, the dissenters believed that the 1988 Act is "not subject to the *Mugler* analysis" because it does not have as its primary purpose the prevention of a nuisance or comparable harms, but instead confers a benefit on the State by creating a habitat for flora and fauna and a place of natural beauty, and by "providing a barrier and buffer from high tides, storm surge, hurricanes and normal erosion." *Id.* at 27. The dissenting Justices would have found a taking on the basis of the trial court's finding that the lots lack fair market value and economically viable use. *Id.* at 29-31. They then would have remanded to the Council to allow petitioner to apply for relief under the "special permit" provisions added by the 1990 amendments to the 1988 Act (see pages 8-10, *infra*) and for an award of compensation if the Council did not grant him one. Pet. App. 31 (citing § 48-39-290(D)) (Supp. 1990).

SUMMARY OF ARGUMENT

1. There is no present basis for finding a permanent taking, in view of petitioner's ability to apply for a special permit under the 1990 amendments. Even if petitioner is granted a special permit, however, he may still have a temporary taking claim for the period prior to the institution of the special permit procedure. This Court need not reach that claim in the first instance, but may instead vacate the judg-

ment below and remand to allow the state courts to consider the viability and validity of any such claim.

2. Government has the established right to prevent certain noxious uses of property that cause serious harm to others without compensating the owner of the offending property, even if the property has substantially diminished economic value in the absence of the prohibited use. Some situations involving total destruction of property or substantial reduction of its value (*e.g.*, destruction of diseased food, condemnation of an unsafe building, or a prohibition against building on an unsafe site) do not require compensation. More generally, regulatory measures that substantially further the public interest in preventing established nuisance-type activities or serious harm to the public health or safety may not require compensation. That "nuisance exception" was well established at the time of the framing and ratification of the Bill of Rights, and is firmly rooted in *Mugler* v. *Kansas*, 123 U.S. 623 (1887), and numerous other decisions, as well as principles of property rights on which those decisions rest.

The scope of this category of measures designed to prevent an established nuisance or protect the public health and safety, however, is by no means coterminous with the full range of a State's police powers. It is instead limited by the principles from which it springs: such measures must in fact respond to serious harms to public health and safety that are substantial in nature, degree, proximity, and context. The South Carolina Supreme Court did not adequately consider whether the restrictions imposed on petitioner's lots meet this standard. That inquiry is particularly important here, where petitioner's two lots are in a highly developed area, the State's own recent amendments contemplate building in some circum-

stances, and petitioner seeks to engage in a normally unobjectionable use—building single-family residences next to other single-family residences. These factors combine to cast considerable doubt on whether the regulatory regime erected by South Carolina in 1988 is properly viewed as directed at a nuisance or threat to safety. A legislature's routine exercise of the police power may not be brought within the "nuisance exception" to normal application of takings analysis simply by incantation of the words "health and safety"; such an approach would render the Just Compensation Clause a hollow guarantee.

3. If a statute does not fall within the narrow category of laws designed to abate a nuisance or similar public health and safety threat, whether it amounts to a taking requires a careful assessment of the three factors the Court has identified in its regulatory-takings decisions: the regulation's economic impact, the character of the governmental action, and the extent to which it interferes with reasonable, investment-backed expectations.

ARGUMENT

I. THIS CASE SHOULD BE CONSIDERED IN LIGHT OF THE SPECIAL PERMIT PROVISIONS ENACTED BY THE 1990 AMENDMENTS TO THE 1988 BEACHFRONT MANAGEMENT ACT

There no longer is any live claim of a permanent taking in this case. The trial court found that the 1988 Beachfront Management Act resulted in a permanent taking of petitioner's lots because it entirely prevented him from building houses on them, rendering them valueless. Pet. App. 37, 40. As the dissenting Justices in the South Carolina Supreme Court pointed out (*id.* at 31), however, the 1990 amendments to that Act now authorize the Coastal Council

to issue a "special permit" to build or rebuild a structure (other than an erosion-control device) seaward of the baseline, if (1) the structure would not be on the active beach or a primary oceanfront dune, (2) the permittee agrees to remove the structure should erosion occur to the extent that the structure becomes situated on the active beach (see § 48-39-270(13) (Supp. 1990)), and (3) the use would not be detrimental to the public health, safety, or welfare. § 48-39-290(D) (Supp. 1990). Petitioner has not sought a special permit under this provision. See Br. in Opp. 5.

This Court has repeatedly admonished that a property owner has no ripe and justiciable claim for a regulatory taking until he has secured at least a final administrative determination of whether and how the regulatory statute will be applied to the property at issue. *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126-127 (1985). This rule is "compelled by the very nature of the inquiry required by the Just Compensation Clause," because the factors applied in deciding a taking claim "simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question." *Williamson County Regional Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172, 190, 191 (1985). See *MacDonald, Sommer & Frates* v. *County of Yolo*, 477 U.S. 340, 348 (1986) ("A court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes."). This requirement defines the point at which a taking claim accrues; identifies precisely what the landowner wants to do with his property and why he believes that the use would not be harmful; establishes the extent to which the agency has

applied the regulatory measure to defeat the proposed use; and enables the agency to furnish particularized reasons to support its action. The issue of whether a permanent taking has occurred simply cannot be addressed until the applicability of the 1990 amendment procedure to petitioner's lots is clarified.

There remains, of course, the question whether a *temporary* taking occurred between passage of the 1988 Act and the 1990 amendments. This quite distinct issue of a temporary taking was not addressed by either court below. In fact, although the Council stipulated at trial (in connection with the permanent taking claim) that an application for a permit to build a home would have been denied under the 1988 Act, it expressly "reserve[d] as an argument concerning temporary damages that no permit has been applied for by [petitioner]." J.A. 3-4.

Thus, the Council apparently has preserved the position that no temporary taking can be found under its regulatory scheme unless the owner has applied for and been denied a permit. See also § 48-39-180. This ripeness argument, and other aspects of any temporary taking claim (including whether petitioner was deprived of any existing or planned use of the property during the relevant period), should be resolved by the state courts in the first instance. Although the South Carolina Supreme Court declined to remand in light of the 1990 amendments (Pet. Reply Br. 3; see Pet. App. 17 n.8), this Court might choose to vacate the judgment below and remand for further consideration in light of those amendments—especially in view of possible threshold impediments to a temporary taking claim, the narrow focus of petitioner's argument to date, and the failure by the courts below fully to consider the relevant aspects of the taking issue.

II. A LIMITED CATEGORY OF REGULATORY MEASURES DESIGNED TO PREVENT NUISANCES OR OTHER SERIOUS HARMS TO PUBLIC HEALTH OR SAFETY DO NOT CONSTITUTE A TAKING EVEN IF THE VALUE OF AFFECTED PROPERTY IS SUBSTANTIALLY DIMINISHED

The Just Compensation Clause of the Fifth Amendment affords vital protection to individual liberty by protecting private property rights against invasion by the government. At the same time, the government has the right to abate nuisances and prevent harm to public health and safety without incurring an obligation to compensate those whose uses are affected, and ownership of private property has never been understood to include the right to engage in noxious uses harmful to public health and safety. The tension between these principles is especially acute where, as the trial court found here under the 1988 Act, a governmental action has a dramatic economic impact on a particular parcel of property. Accordingly, the category of situations that fall within the government's authority to abate nuisance-type activities must be carefully circumscribed so as not to eviscerate the protections of the Just Compensation Clause.

The proper accommodation lies, we submit, in the roots of the *Mugler* principle itself, which recognizes the established need of the government to respond to certain noxious uses of property that affect the persons and property of others, as well as similar actions that threaten identified harm to public health and safety. To justify a finding of no taking on the *Mugler* principle alone, the regulatory measure must substantially further an established nuisance-prevention or public health and safety purpose, in terms of the nature, degree, proximity, and context of the

harm concerned. Such measures plainly do not extend to embrace the full range of a State's police powers, and when government engages in legitimate regulation that is not properly characterized as prevention of such established nuisance-type harms, it may not rely on the *Mugler* principle to immunize itself from compensation demands.

1. It is clear as an initial matter that there exists some category of governmental authority that may result in the substantial diminution of property values, and yet not require payment of compensation as a condition to its lawful exercise. For example, the government may seize and destroy unwholesome foods and unsafe drugs, and may destroy goods to prevent the spread of disease.[2] Similarly, under the Controlled Substances Act, 21 U.S.C. 801 *et seq.*, it may be lawful to manufacture, possess and sell a certain drug one day and a felony to do so the next (see, *e.g.*, *Touby* v. *United States*, 111 S. Ct. 1752 (1991)), with the result that existing stocks are rendered valueless. The government's ability to protect the public through such measures is historically well established and thus has not been conditioned upon payment of compensation to those who would inflict the harm.[3]

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[2] See, *e.g.*, Federal Food, Drug and Cosmetic Act, 21 U.S.C. 301 *et seq.*; Federal Meat Inspection Act, 21 U.S.C. 601 *et seq.*; Poultry Products Inspection Act, 21 U.S.C. 451 *et seq.*; 21 U.S.C. 350a (prohibiting sale of adulterated infant formula); see also Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. 136 *et seq.*

[3] See 4 W. Blackstone, *Commentaries* 162 (1769) (statutes prohibiting sale of unwholesome food); *Russell* v. *Mayor, etc., of New York*, 2 Denio 461, 476 (1845) (New York statute passed during cholera epidemic authorizing destruction of

The same principle also applies to real property. Thus, the government may condemn a residence or other building that is unsafe for habitation, even though the value of the building (in itself a distinct species of property) will be entirely destroyed, or may bar construction in an unsafe manner (*e.g.*, by requiring compliance with a building code), even where compliance would render it economically unviable to proceed. Restrictions against siting a residence or other building on a steep slope or other unsafe location stand on an equal footing. In other circumstances, affirmative obligations imposed on the owner to protect public health and safety may also have a substantial effect on the value of the property. See *Midlantic Nat'l Bank* v. *New Jersey Dep't of Environmental Protection*, 474 U.S. 494, 502, 509 & n.2 (1986). Another familiar example, deeply rooted in history, is the right of the government (without compensating the owner) to tear down a struc-

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"an unlimited amount of the property of its citizens, for the purpose of preventing the spread of the disease, without imposing any obligation or subjecting [the agents] to any responsibility whatever"); *Gilman* v. *Philadelphia*, 70 U.S. (3 Wall.) 713, 730-731 (1865) ("a bale of goods, * * * laden with infection, may be seized under 'health laws,' and if it cannot be purged of its poison, may be committed to the flames"); *Sligh* v. *Kirkwood*, 237 U.S. 52, 59-60 (1915) (such items are not "legitimate subjects of trade or commerce" and "may be rightly outlawed as intrinsically and directly the immediate sources and causes of destruction to human health and life"); *Empire Kosher Poultry, Inc.* v. *Hallowell*, 816 F.2d 907 (3d Cir. 1987) (no taking in context of poultry quarantine); but cf. *Yancey* v. *United States*, 915 F.2d 1534 (Fed. Cir. 1990); but see *McDougal* v. *County of Imperial*, 942 F.2d 668, 675-680 (9th Cir. 1991) (remanding for inquiry into substantiality of public interest underlying floodway ordinance, as well as private interest affected).

ture in order to create a firebreak. See *Respublica* v. *Sparhawk*, 1 U.S. (1 Dall.) 357, 362 (Pa. 1788) ("Houses may be razed, to prevent the spreading of fire, because for the public good."); *Stone* v. *Mayor & Aldermen*, 25 Wend. 157, 161 (N.Y. 1840) (quoting 2 *Kent's Commentaries* 339); *id.* at 173-174;[4] *Bowditch* v. *Boston*, 101 U.S. 16, 18-19 (1879);[5] *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 415-416 (1922); see also *United States* v. *Caltex, Inc.*, 344 U.S. 149, 154 (1952).

2. The roots of the foregoing principles extend deep into the Court's precedents and historical definitions of private property rights, and into the correlative power of the government to abate nuisances and protect public health and safety from serious harm.[6] This backdrop is important because historical

[4] See also 25 Wend. at 176 (citing *Mouse's Case*, 12 Coke Rep. 62 (merchandise thrown overboard to save passengers)).

[5] "At the common law every one had the right to destroy real and personal property, in cases of actual necessity, to prevent the spreading of a fire, and there was no responsibility on the part of such destroyer, and no remedy for the owner. * * * There are many other cases besides that of fire,—some of them involving the destruction of life itself,—where the same rule is applied. * * * In these cases the common law adopts the principle of the natural law, and finds the right and the justification in the same imperative necessity." 101 U.S. at 18-19.

[6] See *The License Cases*, 46 U.S. (5 How.) 504, 589 (1847) (opinion of McLean, J.):

> The acknowledged police power of a State extends often to the destruction of property. A nuisance may be abated. * * * It is a power essential to self-preservation, and exists, necessarily, in every organized community.

understandings give content to the Bill of Rights, including the Fifth Amendment (see, *e.g.*, *Griffin* v. *United States*, No. 90-6352 (Dec. 3, 1991), slip op. 3-5), and because those understandings must be taken into account in assessing what the Framers understood the private property they were protecting from uncompensated takings to include. If the use of property in a particular way was not part of the owner's "bundle" at the time he acquired the property, he cannot claim the government has "taken" from him the right to that use.

The necessary interrelationship between property rights and the correlative power of the government to protect the person and property of others (and the public interest) first received extensive treatment by this Court in *Mugler* v. *Kansas*, 123 U.S. 623 (1887).[7] But the principles applied in *Mugler* did not originate in that case; they find their roots in the law of nuisance in England[8] and were already widely accepted in the law of the States pertaining to property rights

[7] See also 123 U.S. at 666-667, discussing *Fertilizing Co.* v. *Hyde Park*, 97 U.S. 659, 667 (1878), which sustained an ordinance prohibiting the manufacture of fertilizer, even though it "operated to destroy the business of the company, and seriously to impair the value of its property," because it had become a nuisance. 123 U.S. at 667. The Court continued: " 'That power belonged to the States when the Federal Constitution was adopted. They did not surrender it, and they all have it now. * * * It rests upon the fundamental principle that every one shall so use his own as not to wrong and injure another. To regulate and abate nuisances is one of its ordinary functions.' " *Ibid.* (quoting 97 U.S. at 667).

[8] 3 W. Blackstone, *Commentaries* 216-218 (1768); 4 *id.* at 168; Restatement (Second) of Torts § 821B, comment a; *id.* § 821D, comment a (1979).

and constitutional protections.[9] For example, in *Stuyvesant* v. *Mayor &c. of New York*, 7 Cow. 588 (1827), the New York Supreme Court sustained an ordinance that barred interment in certain parts of the City. Accord, *Laurel Hill Cemetery* v. *San Francisco*, 216 U.S. 358, 366 (1910); *Appeal of Kincaid*, 66 Pa. 411, 423-424 (1870). In addition, the Court in *Mugler* relied (123 U.S. at 665) on the frequently cited decision of the Supreme Judicial Court of Massachusetts in *Commonwealth* v. *Alger*, 61 Mass. 53 (1851), which involved an ordinance barring construction of wharves beyond a harbor line and declaring such wharves to be a nuisance. Similarly, and instructive here, *Commonwealth* v. *Tewksbury*, 52 Mass. 55 (1846), sustained, as applied to the owner of beach property, an ordinance barring removal of sand or gravel from a beach. Because property "is held under the implied obligation that the owner's use of it shall not be injurious to the community" (*Mugler*, 123 U.S. at 665),[10] the power of the government to adopt such measures continues to exist—and continues to define and limit the underlying property right—even if it remains unexercised. So long as the government regulation does not depart from the common law origins of nuisance, there is no taking.[11]

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[9] See, *e.g.*, *People* v. *Hawley*, 3 Mich. 330, 342 (1854); *Pumpelly* v. *Greenbay Co.*, 80 U.S. (13 Wall.) 166, 177-178 (1872).

[10] See also *Stuyvesant* v. *Mayor &c. of New York*, 7 Cow. at 605; *Commonwealth* v. *Alger*, 61 Mass. at 84-85.

[11] Nor have this Court's post-*Mugler* decisions suggested any departure from *Mugler*'s fundamental principles. See *Hadacheck* v. *Sebastian*, 239 U.S. 394 (1915) (no taking where law forbade operating brickyard in residential area); *Reinman* v. *City of Little Rock*, 237 U.S. 171 (1915) (no taking where law forbade operating livery stable in downtown area); *Miller* v. *Schoene*, 276 U.S. 272 (1928) (state required destruction of cedar trees to protect apple trees from cedar rust disease, where apples were an economically important crop); *Goldblatt* v. *Town of Hempstead*, 369 U.S. 590 (1962) (no taking where law forbade excavation of sand and gravel below water line to protect public water supply); see also *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470, 488-492 (1987).

III. THE CATEGORY OF MEASURES THAT DO NOT CONSTITUTE A TAKING SOLELY BECAUSE THEY ARE DESIGNED TO PREVENT NUISANCES AND OTHER HARMFUL USES OF PROPERTY MUST BE LIMITED BY REFERENCE TO THE NATURE, DEGREE, PROXIMITY AND CONTEXT OF THE HARM

For the reasons stated in Point II, we agree with the view—endorsed by all Justices of the South Carolina Supreme Court— that there is a category, properly defined, of regulatory measures designed to prevent nuisances or harm to public health and safety that do not constitute a taking, even if, in certain circumstances, they substantially diminish the value of the affected property. But it is precisely because of this potential impact that the category of cases falling under the *Mugler* principle must be carefully circumscribed according to the underlying exigencies that justify it. That is especially so as regards real property, which typically is not subject to the sort of pervasive regulation—or the potential for such regulation—that often attends ordinary commerce in goods and services. It is on the application of these principles here that we disagree with the South Carolina Supreme Court.

1. In the first place, as this Court has made clear, the category of regulatory measures whose applica-

tion may be justified (without payment of compensation) solely on the *Mugler* rationale " 'is not coterminous with the police power itself.' " *Keystone*, 480 U.S. at 491 n.20 (quoting *Penn Central Transp. Co.* v. *New York City*, 438 U.S. 104, 145 (1978) (Rehnquist, J., dissenting)); see also 480 U.S. at 512 (Rehnquist, C.J., dissenting). The general rule is that the takings implications of a regulatory measure must be analyzed under the Court's three-factor test, under which the purpose of the regulation is not dispositive. See pages 25-26, *infra*. Otherwise, the police power would swallow the Just Compensation Clause.

The *Mugler* principle, rather, is confined to measures that are designed to protect public health and safety from serious harm or to prevent or abate a nuisance-type activity. It is essential, moreover, that the type of nuisance measures falling within this category be defined in an objective and non-manipulable manner, for otherwise a legislature could circumvent the Just Compensation Clause in the regulatory context simply by designating as a nuisance whatever use of property it wished to restrict. Thus, although the Court has noted that legislatures are not strictly limited by common-law categories in determining what constitutes a nuisance for these purposes, *Miller* v. *Schoene*, 276 U.S. at 280, the common law *origins* of the rule should inform a court's review of a statute to determine whether it falls under the *Mugler* principle. Accordingly, before concluding that *Mugler* applies, a reviewing court must determine that the statute is rooted in the principle that individuals may not make a "noxious use of their property, to inflict injury upon the community." *Mugler*, 123 U.S. at 669. A landowner could not reasonably have expected to put his property to such a use. By contrast,

regulatory measures (such as a typical zoning ordinance) that restrict one person's use of his property in order to confer a *benefit* on adjacent property owners or the public at large do not constitute the abatement or prevention of a nuisance for purposes of the *Mugler* principle. Compare 3 W. Blackstone, *supra*, at 217 ("But depriving one of a mere matter of pleasure, as of a fine prospect, by building a wall, or the like; this, as it abridges nothing really convenient or necessary, is no injury to the sufferer, and is therefore not an actionable nuisance."). Such regulatory efforts must be analyzed under the usual three-factor test to determine whether the government must compensate affected landowners.

The court below purported to recognize this point, stressing that it was not holding that the mere fact that the State acted pursuant to its police power ended the inquiry, but rather that no taking occurs when a State "acts to prevent a serious public *harm*." Pet. App. 11. The difficulty is that the legislative findings and policies in the 1988 Act on which the court exclusively relied in rejecting petitioner's taking claim demonstrate that the Act furthers a number of ultimate purposes, only some of which might fall within the nuisance or safety rationale. Compare *Keystone*, 480 U.S. at 512-513 (Rehnquist, C.J., dissenting). The Act recites, for example, that the beach/dune system it seeks to protect provides a basis for the State's tourism industry (which contributes substantially to the State's economy and tax base) and a natural environment for the well-being of its citizens, and that it is in the public interest to promote increased public access to the State's beaches. S.C. Code Ann. § 48-39-250(1)(b) and (d), (8) (Supp. 1990); see also § 48-39-260(1)(b) and (c),

(6) (Supp. 1990). Achievement of these goals may benefit the people and economy of the State, but they plainly do not, in themselves, bring this case under the *Mugler* doctrine. The nuisance exception to the usual regulatory-taking analysis is premised on the prevention of harmful or dangerous uses of property—in the nature of nuisance—and not on the conferral of benefits on the public at large or owners of adjacent property. By contrast, other stated purposes of the Act—such as protection of life and property—are of the sort that, in proper circumstances, do fall within the *Mugler* doctrine. See §§ 48-39-250(1)(a) and (d), (3), 48-39-260(1)(a), (3), and (4) (Supp. 1990); see also 16 U.S.C. 1452(2) and 1456b(a)(2) (CZMA provisions stating comparable goals).

For these reasons, a more searching inquiry was required at the threshold to determine which of the purposes of the Act were actually implicated in application of the building restrictions to petitioner's lots, and whether those purposes are of a sort that fall within the *Mugler* category of nuisance-prevention or efforts to protect public health and safety from serious harm. In cases where a statute serves a variety of collateral purposes, there is the potential that it goes "beyond the necessities of the case," *Chicago, B. & Q. Ry.* v. *United States*, 200 U.S. 561, 593 (1906), and scrutiny of the fit between means and ends is necessary to ensure that the affected property owner is not being asked to bear "more than his just share of the burdens of government." *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312, 325 (1893).

2. Furthermore, a regulatory statute is not immune from a Fifth Amendment claim merely because it bears some plausible nexus to the prevention of

harm to individuals, property, or the public at large. If that were enough, the established principle that a house may be razed to prevent the spread of a fire (see pages 13-14, *supra*) could be extended to permit the razing of every other house in an existing row, to prevent the spread of a fire *if* one should occur. See *Keystone*, 480 U.S. at 513 (Rehnquist, C.J., dissenting) ("nearly every action the government takes is intended to secure for the public an extra measure of 'health, safety, and welfare' "). Thus, the foundation of the *Mugler* doctrine requires that, in order for the doctrine to apply, "a statute purporting to have been enacted to protect the public health, the public morals, or the public safety" must actually have a "real and substantial relation" to those objects. *Mugler*, 123 U.S. at 661; *Chicago, B. & Q. Ry.* v. *United States*, 200 U.S. at 593 ("real" and "substantial" relation); cf. *Nollan* v. *California Coastal Comm'n*, 483 U.S. 825, 834-835 (1987) (condition must "substantially advance" the state interest). At least where its application to a particular parcel of real property precludes previously unrestricted uses, a determination of whether the requisite "real and substantial relation" exists requires an assessment of the degree of the harm to which the statute is addressed [12]—and, where the harm will occur (if at all) only in the future, its likelihood and proximity.

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[12] This principle is an established element of modern tort law as well. See Restatement (Second) of Torts § 821B (1979) (a public nuisance is an "unreasonable" interference with a right common to the general public, and a relevant circumstance in making that determination is whether the conduct involves a "significant interference" with, *inter alia*, public health or safety); *id.* § 821F (liability for a nuisance only to those to whom it causes "significant harm"); *id.* § 826 (invasion of another's use and enjoyment of land is unreason-

In this case, the 1988 Act prohibited new construction of any but temporary buildings seaward of a baseline fixed by the Coastal Council. In an erosion zone such as that in which the Wild Dunes development is located, the baseline was to be fixed at the landward-most point of erosion during the past 40 years, unless the available data indicated that the shoreline would be unlikely to return to its former position. See pages 3-4, *supra*. Application of this statutory formula placed the baseline on the road landward of petitioner's lots, and petitioner has not challenged that determination. T.R. 40. In addition, the Council introduced evidence at trial concerning the factual premises for the location of the baseline, recent episodes of erosion in the vicinity, and the possibility that erosion might occur to the extent that petitioner's premises would be situated on active beach. T.R. 65-88, 99-104. However, neither the trial court nor the South Carolina Supreme Court discussed the statutory requirements for drawing the baseline, the relationship of those requirements to purposes of the Act that might fall within the category of nuisance-prevention or public health and safety measures covered by the *Mugler* principle, the extent (if any) to which those purposes were addressed by the location of the baseline as it affected petitioner's lots, or the degree, likelihood, or prox-

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able if "the gravity of the harm outweighs the utility of the actor's conduct" or "the harm caused by the conduct is serious and the financial burden of compensating for this and similar harm to others would not make the continuation of the conduct not feasible"); 1 F. Harper, F. James & O. Gray, *The Law of Torts* § 1.23, at 81 (1986) (a "requirement common to all private nuisance cases is that the interference must be *substantial*").

imity of the identifiable harms to which the Act is addressed.

3. In addition, an important element of the nuisance justification for application of the *Mugler* principle is the context in which the restriction applies, including the normal uses of property in the vicinity. This important element serves to protect the reasonable expectations of the property owner. As this Court said in *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365, 388 (1926):

> [T]he question whether the power exists to forbid the erection of a building of a particular kind or for a particular use, like the question whether a particular thing is a nuisance, is to be determined, not by an abstract consideration of the building or of the thing considered apart, but by considering it in connection with the circumstances and the locality.

See also *Commonwealth* v. *Alger*, 61 Mass. at 88; Restatement (Second) of Torts § 831 (1979).

It is as an initial matter strange to characterize the building of a single-family residence as a "nuisance." Here, houses have been built adjacent to petitioner's lots. It is stranger still to characterize as a "nuisance" the building of a house on a lot in a platted subdivision along a beach where other houses are already located.[13] In this respect, this case appears to be the mirror image of *Hadacheck* v. *Sebastian*, 239 U.S. 394 (1915), and *Reinman* v. *City of*

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[13] The owners of existing houses were affected by the 1988 Act to some extent, however, because it prohibited reconstruction of homes that might thereafter be destroyed by fire or natural causes. § 48-39-290(A) (Supp. 1990) (Pet. App. 116); see *Esposito* v. *South Carolina Coastal Comm'n*, 939 F.2d 165 (4th Cir. 1991).

Little Rock, 237 U.S. 171 (1915), where the use was prohibited because it was inconsistent with surrounding uses. Furthermore, where a statute uniquely prohibits a use of property that is permitted on adjacent parcels, the purposes of the Just Compensation Clause are directly implicated, because the owner is being asked to "surrender[] to the public something more and different from that which is exacted from other members of the public." *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312, 325 (1893). See also *Nollan*, 483 U.S. at 835-836 n.4; cf. *Commonwealth* v. *Alger*, 61 Mass. at 102 ("If such restraint were in fact imposed upon the estate of one proprietor only, out of several estates on the same line of shore, the objection would be much more formidable.").

4. Finally, in order for a taking claim to be rejected on the basis of the *Mugler* principle alone, a measure designed to abate or prevent a nuisance-type activity in the present context should, where feasible, be tailored to address the identified harm to the person or property of others (or to public health and safety), while minimizing the impact on the affected property. Cf. 1 F. Harper, F. James & O. Gray, *supra*, § 1.30, at 126-127; *Chenango Bridge Co.* v. *Page*, 83 N.Y. 178 (1880); *Babcock* v. *City of Buffalo*, 56 N.Y. 268, 272-273 (1874). Here, the 1990 amendments demonstrate that such tailoring was feasible, for they provide for issuance of a special permit to build a house seaward of the baseline, subject to the condition that the structure be removed if erosion occurs to the point that the structure becomes situated on active beach—at which point the attendant nuisance and safety concerns presumably would be most directly implicated. For this reason as well, the case should be remanded for further consideration

of petitioner's taking claim in light of the 1990 amendments.

5. If the South Carolina Supreme Court concludes on remand that application of the 1988 Act to petitioner's lots cannot be justified (without payment of compensation) on the basis of the *Mugler* doctrine alone, it should evaluate the case under the multifaceted analysis the Court has brought to bear on the question whether a taking has occurred in the regulatory context. In that setting, "no precise rule determines when property has been taken," and "the question necessarily requires a weighing of private and public interests." *Agins* v. *City of Tiburon*, 447 U.S. 255, 260-261 (1980); see also *Goldblatt* v. *Town of Hempstead*, 369 U.S. 590, 593-594 (1962); *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. at 416 (taking issue is "a question of degree—and therefore cannot be disposed of by general propositions").

This approach reflects the wide range of governmental actions and resulting impacts upon private property interests in which the question may arise. Although the Court has been "unable to develop any 'set formula'" for this purpose, *Penn Central*, 438 U.S. at 124, it has identified three factors that are relevant to the inquiry: (1) "the economic impact of the regulation on the claimant"; (2) "the extent to which the regulation has interfered with distinct investment-backed expectations"; and (3) "the character of the government action." *Ibid.*; *Connolly* v. *PBGC*, 475 U.S. 211, 225 (1986); *Williamson County*, 473 U.S. at 191; *Kaiser Aetna* v. *United States*, 444 U.S. 164, 175 (1979). Although the South Carolina Supreme Court adverted to these factors (Pet. App. 9), it did not fully consider them, since it disposed of the case in reliance on *Mugler*. The trial court focused on the economic impact of the 1988 Act

on petitioner, but did not address the purposes served by the Act or the extent and reasonableness of petitioner's investment-backed expectations concerning his lots. Pet. App. 39-40. These issues are properly left, as an initial matter, to the state courts on remand.

CONCLUSION

The judgment of the Supreme Court of South Carolina should be vacated and the case remanded for further proceedings.

Respectfully submitted.

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